Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

ARTHUR S. BECHHOEFER,

Petitioner,

vs.

U.S. DEPARTMENT OF JUSTICE DRUG ENFORCEMENT ADMINISTRATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Douglas S. Gates, Esq.
Counsel of Record
GATES & ADAMS, P.C.
28 East Main Street, Suite 600
Rochester, New York 14614
(585) 232-6900

Counsel for Petitioner

11 Centre Park
Rochester, New York 14614
(585) 232-6920

(5266)
THE DAILY RECORD

107 Delaware Avenue — Suite 81
Buffalo, New York 14202
(716) 847-2984

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QUESTIONS PRESENTED

1. Whether the Privacy Act permits a federal agency to release an informant's letter to named suspects after the agency has ceased investigating the letter.

2. Whether the unauthorized release of an informant's letter (solicited by a government agent and then retained in his desk drawer with other pre-investigation records) is exempted from the Privacy Act by the informality of the manner in which the records were maintained.

3. Whether it matters that the records in the drawer were not *indexed* to facilitate retrieval of information by name, when the informant's letter was *in fact* retrieved by the author's name.

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OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals in support of the Order sought to be reviewed is reported at 312 F3d 563 (2nd Cir., 2002). The District Court opinion, which resulted in a judgment of dismissal, is reported at 179 F.Supp.2d 93 (W.D.N.Y. 2001).

JURISDICTION

The Second Circuit filed its decision on December 6, 2002, and entered an Order denying Petitioner's motion for rehearing on February 14, 2003. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the Circuit Court's decision on a writ of certiorari.

STATUTORY PROVISION INVOLVED
5 U.S.C. §552a

...

(a)(5) [T]he term "system of records" means a group of any records under the control of an agency from which information is retrieved by the name of the individual... .

(b) Conditions of Disclosure.--No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior consent of, the individual to whom the record pertains, ...

The full statute is reprinted in the Appendix at 35 *et seq.*

STATEMENT OF FACTS

The Petitioner, Arthur Bechhoefer, is an investment advisor who, in the summer of 1993, telephoned the DEA to report activity that suggested illegal drug activity in his neighborhood. The agent who took the call, Jeffrey Gelina, asked Petitioner to detail his suspicions, including names of suspects, in writing, and Petitioner complied in a letter marked "CONFIDENTIAL".

After receiving the letter, Agent Galina and two of his colleagues, including Agent Robert Nearing, conducted a preliminary investigation of Petitioner's allegations. At one point Agent Nearing telephoned Petitioner and began discussing the substance of the letter over Petitioner's unsecured phone line. Alarmed by this, Mr. Bechhoefer then sent a second letter, this one refusing to cooperate further until being shown Nearing's and Gelina's credentials as DEA agents. Upon receipt of this second letter the agents decided not to further pursue the matters raised in Petitioner's first letter.

Up to that point Agent Nearing had not formally opened a file on the matter, and he had kept Petitioner's "informant" letter in his desk drawer with other "pre-investigation" records he maintained there. Although Nearing's investigation of that letter ended when Petitioner questioned his credentials, Nearing neither discarded Mr. Bechhoefer's letters nor destroyed them. (Nor, as suggested by the Second Circuit, did he stuff them into a coat pocket.) Instead, Agent Nearing retained both letters in his drawer of pre-investigatory material so that he was able, a few days later, to retrieve both letters from his drawer, by reference to Petitioner's name on the letters, and

fax them to a local sheriff's deputy **whom Petitioner had named as a suspect.**

A short time later that same deputy filed a criminal charge against Petitioner in state court, based upon the letter, for "filing a false report". The charge was later withdrawn by the local District Attorney (who happened to be Agent Nearing's brother-in-law), but only after the deputy and others named in the letter had brought defamation actions against Petitioner seeking millions of dollars in damages.

Petitioner commenced this action against the DEA (as authorized by statute[1]) for violating subdivision (b) of the Privacy Act (5 USC §552a), which provides as follows:

> (b) Conditions of Disclosure.--No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior consent of, the individual to whom the record pertains, ...

The District Court dismissed the complaint, on the ground that Petitioner's letters had not been contained in a "system of records," even though the letters Agent Nearing had kept in his drawer met the literal definition of "system of records" set forth as 5 U.S.C. §552(a)(5), i.e.:

> a group of any records under the control of an agency from which information is retrieved by the name of the individual ... .

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[1] Jurisdiction was based upon 5 U.S.C. §552a(g)(1)(D) and 28 U.S.C. §1331.

The Second Circuit affirmed without regard to the statutory definition, holding instead that once Nearing and Gelina decided to stop investigating Bechhoefer's allegations, his letter became irrelevant to the DEA's mission; and that since the letter had not been incorporated into the Agency's formal record-keeping system before that time, it never became part of a "system of records" protected under the Act[2]. Appendix at 12. Mr. Bechhoefer's Petition for Rehearing was denied on February 14, 2003.

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[2] The Second Circuit left undisturbed the District Court's finding that the faxing of Petitioner's letter to the deputy sheriff was not otherwise authorized under the statute. See Appendix at 30-32. Nor is Petitioner's good faith in sending the letter in issue.

REASONS FOR GRANTING THE PETITION

I. This Case Presents an Important Question of Federal Law That Has Not Been, but Should Be, Settled by This Court.

There are signs posted on the Beltway that encourage citizens to report information about possible terrorist activity to a government telephone number. After what happened to Petitioner in this case, he won't be accepting that invitation anytime soon. Neither will anyone else who learns what happened to Mr. Bechhoefer when he sent a "confidential" informant letter to the DEA at the request of one of its agents.

Congress passed the Privacy Act in 1975 in the wake of Watergate. Its purpose was to "promote governmental respect for the privacy of citizens" by closely limiting the Federal Government's collection and use of personal information about citizens, whether maintained in computerized or manual files. Senate Report No. 93-1183, 1974 WL 11674, p. 1. The result was a broadly worded statute that, among other things, prohibits the federal government from disclosing to others personal information about an individual without that individual's consent. Id., p. 2. The Second Circuit confirmed in an earlier appeal that Petitioner, and the information in his informant letter, were eligible for the Act's protection. Bechhoefer v. U.S. Dept. of Justice D.E.A., 209 F3d 57 (2nd Cir., 2000).

Although this Court has made passing reference to the important role the Privacy Act plays in protecting citizens from government disclosure of sensitive

information[3], it has never specifically addressed the scope of that protection, or the nature of the obligation the Act imposes upon government employees who gather or maintain records containing sensitive personal information. Indeed, the Court has repeatedly denied certiorari petitions seeking review of Privacy Act interpretations by the Circuit Courts of Appeal. E.g., Bettersworth v. F.D.I.C., Cert. Den., 534 US 1021 (2001); Gowan v. Department of Air Force, Cert. Den., 525 US 1042 (1998); Hudson v. Reno, Cert. Den., 535 US 822 (1998); Boyd v. Lehman, Cert. Den., 464 US 1043 (1984); Williams v. Department of Veterans Affairs, Cert. Den., 526 US 1150 (1999); Baker v. Department of Navy, Cert. Den., 44 US 963 (1987); White v. Office of Personnel Management, Cert. Den., 444 US 830 (1979); Savarese v. Harris, Cert. Den., 449 US 1078 (1981); Manuel v. Veterans Admin. Hosp., Cert. Den., 489 US 1055 (1989); Clarkson v. I.R.S., Cert. Den., 481 US 1031 (1987); Winters v. Board of County Com'rs, Cert. Den., 511 US 1031 (1994); Korwitz v. Department of Agriculture, US Forest Service, Cert. Den., 484 US 1009 (1988); Beller v. Lehman, Cert. Den., 452 US 905 (1981); Ash v. U.S., Cert. Den., 445 US 965 (1980); Kimberlin v. United States Department of Justice, Cert. Den., 478 US 1009 (1986).

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[3] E.g., U.S. Dept. of Defense v. Federal Labor Relations Authority, 510 US 487, 474 (1994) [Freedom of Information Act case in which the Court observed that employee addresses are exempt because their disclosure is "otherwise prohibited by law" by the Privacy Act]; Chrysler Corp. v. Brown, 441 US 281, 293, fn. 14 (1979) [distinguishing release of information by private corporations from requirement of Privacy Act that public agencies "withhold records about an individual from most third parties unless the subject gives permission"]; Detroit Edison Co. re. N.L.R.B., 440 US 301, 319, fn. 16 [observing, in an Unfair Labor Practice case, that records in government personnel folders are generally protected from disclosure by the Privacy Act].

In post September 11, 2001 America, the Federal Government is dramatically increasing its efforts to encourage citizens to report suspicious activities that even suggest the possibility of potential terrorist activity or other public danger. If these efforts are to be successful, citizens must feel secure that information they impart to the government in confidence will be held in confidence. They especially need to know that information they provide will not be made available to named suspects, either during an investigation or after an investigation has been terminated.

This Court's assumption, as reflected in *dicta* in various cases, as well as the assumption of the Congress that passed the Privacy Act, as reflected in Senate Report No. 93-1183, has been that the Act gives citizen-informants those assurances. However, the decision of the Second Circuit below says just the opposite.

Although the Privacy Act itself extends protection to information contained in "a group of any records under the control of an agency from which information is retrieved by the name of the individual," the decision below says that no such protection is intended once the agency concludes or aborts its investigation of the information provided by an informant. It also suggests that no such protection will be recognized if the federal employees who receive citizen information choose to maintain it in an informal fashion, whether or not that decision conflicts with agency rules concerning information processing.

No intelligible policy is advanced by these holdings of the Second Circuit. Is an informant in need of less protection because, for example, a given investigation is not fruitful or prosecution results in acquittal?

If the interpretation of the Court below is correct then the Privacy Act actually encourages sloppiness and

informality by government employees in the handling of personal information, rather than "accountability, responsibility, legislative oversight, and open government" as envisioned by the Congress that passed the Privacy Act. Senate Report No. 93-1183, supra, at p. 1.

However, at a time when our nation relies more than ever upon tips from its citizens concerning activities that are potentially dangerous to human life and national security, it is essential that this Court declare authoritatively whether the Second Circuit's interpretation is right or wrong. Only then can citizens make enlightened decisions about sharing their suspicions with government employees. Only then can government employees know the degree of care with which they must treat sensitive information that comes into their hands from such citizens.

The Second Circuit in the case below, and other Courts of Appeals in other cases, have, when interpreting the term "system of records", focused exclusively on that part of the Act that requires the government to grant individuals access to information about themselves contained in an agency's "system of records." These courts have been sympathetic to the pleas of government officials that a literal application of the statutory definition would make the obligation to furnish access unmanagable.

Managerial concerns are given undue weight below. In advancing the cause of administrative convenience, the

Second Circuit has lost sight of the primary purpose of the Act, which is to protect individuals against government abuse in the gathering and disseminating of private information about them.[4]

II. The Determination in the Court Below Conflicts With Both the Statute Itself and the Decision of Another United States Court of Appeals on the Same Important Matter.

As the Second Circuit and other Courts of Appeal lose sight of the primary purposes of the Act, they have strayed from the plain meaning of its carefully drafted terms. In construing the statutory definition of "system of records," they limit the definitional phrase "group of any records" to mean only certain groups of records; and they inquire not whether "information is retrieved" by personal identifier, as specified by the statute, but rather whether the "system" in question was indexed to facilitate such retrieval.

This shifting of analysis away from the plain meaning of the Act is contrary to the statutory intent as reflected in its own words and in its legislative history. It is

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[4] As Judge John Sirica put it not long after the Privacy Act was passed in 1975:

> Properly understood, the right to access under Section 3(d) [of the Privacy Act] is aimed entirely at improving informational quality. This is in sharp contrast to parallel rights guaranteed by the Freedom of Information Act. Unlike the FOIA, access to agency records... is not a statutory objective for its own sake.

Smiertka v. Dept. of Treasury, 447 Fsupp. 221, 226 (D.D.C. 1978), remanded on other grounds, 604 F2d 698 (D.C. Cir., 1979).

also inconsistent with the decision of the Court of Appeals for the D.C. Circuit in Henke v. U.S. Department of Commerce, 83 F3d 1453 (D.C. Cir., 1996).

In the present case the records in Agent Nearing's drawer were undisputably a "group of records," and Petitioner argued that since Petitioner's letters were *in practice* retrieved by reference to his name[5], the drawer of pre-investigative materials was literally a "system of records" as defined by the statute. The opinion of the Second Circuit rejected this argument by ignoring it. In contrast, the DC Circuit in Henke, supra, held that retrieval in practice is the *sine qua non* of the statutory definition of "system of records."

In Henke, supra, a request for access to personal records was denied because the government did not, *in practice*, retrieve information from the relevant files by reference to Petitioner's name. The Henke court observed that Congress deliberately defined the term "system of records" by reference to whether information *is retrieved* by the name of an individual and not by reference to whether the files were organized or indexed to accommodate such retrieval. Id., at 1459-1460. The D.C. Circuit expressly held that, "if there is evidence that an agency *in practice* retrieves information about individuals by reference to their names, the mere fact that the agency has not acknowledged that it operates a system of records will not protect it from the statutory consequences of its actions." Id., at 1461.

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[5] This was not a matter of "surmise" as suggested by the Court of Appeals. It was, rather, admitted by Agent Nearing in his testimony. Appendix at 20-21.

CONCLUSION

All of the cases relied upon by the Second Circuit below -- and indeed most of the reported Privacy Act decisions in the Circuit Courts -- deal with petitioner requests for access to records about themselves. Few appellate cases involve, as this case does, application of the Privacy Act's prohibition against dissemination of personal information to others.

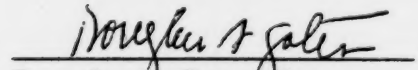
The decision of the Second Circuit in this case now stands as the principal guiding authority on the issue. And as argued above, that decision encourages bureaucratic informality and carelessness in the handling of sensitive personal information rather than encouraging responsibility and accountability as Congress intended when it passed the Privacy Act. It therefore discourages citizens from reporting suspicious activity that might end up being shared with the persons engaging in that activity. That's what happened to Mr. Bechhoefer. And the decision below, unless corrected by this Court, will increase the likelihood that it will happen to others as well.

For the foregoing reasons, this Court should grant the Petition for a writ of certiorari and review the important Privacy Act issues implicated in the decision and order of the Second Circuit Court of Appeals.

Dated: May 9, 2003

Respectfully submitted,

Gates & Adams, P.C.



Douglas S. Gates, Esq.
Counsel for Petitioner
28 East Main Street
Suite 600
Rochester, New York 14614
(585) 232-6900

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DEC - 6 2002

(Argued: October 15, 2002 Decided:)

Docket No. 01-6244

— — — — — — — — — — — — — —X

ARTHUR S. BECHHOEFER,

Plaintiff-Appellant,

-v.-

U.S. DEPARTMENT OF JUSTICE, Drug Enforcement Administration,

Defendant-Appellee,

ROBERT NEARING, JEFFREY GELINA,

Defendants.

— — — — — — — — — — — — — —X

BEFORE: LEVAL, CALABRESI, and B.D. PARKER, *Circuit Judges.*

Appeal from an order of the United States District Court for the Western District of New York (Larimer, *Chief Judge*) granting summary judgment to defendant, the United States Drug Enforcement Administration, dismissing plaintiff's suit for damages under the Privacy Act of 1974, 5 U.S.C. § 552a *et seq.* The district court ruled that because the document disclosed by the defendant was not contained in the agency's filing or classification system and was not retrieved by reference to a name or symbol, it was not within

the Act's definition of "system of records," and was not covered by the Act. AFFIRMED.

ANTHONY J. ADAMS, JR., Gates & Adams, P.C., Rochester, NY, *for Plaintiff-Appellant,*

TIFFANY LEE, Assistant United States Attorney, for Michael A. Battle, United States Attorney for the Western District of New York, (Brian McCarthy, Assistant United States Attorney, *on the brief*), Rochester, NY, *for Defendant-Appellee.*

LEVAL, *Circuit Judge:*

Plaintiff appeals from the grant of summary judgment to defendant by the United States District Court for the Western District of New York (Larimer, *Chief Judge*). Plaintiff brought suit against the United States Department of Justice, Drug Enforcement Administration ("DEA"), alleging that in making a disclosure of records relating to the plaintiff, the DEA violated the Privacy Act of 1974 (the "Privacy Act" or the "Act"), 5 U.S.C. § 552a(b). The Act provides, in part, "No agency shall disclose any record which is contained *in a system of records* . . . to any person, or to another agency, except . . . with the prior written consent of, the individual to whom the record pertains." *Id.* (emphasis added). The district court ruled that because the record in question — a letter sent by plaintiff to a branch office of the DEA — was not filed in

a manner that would permit retrieval by an identifying name, number or symbol, but was merely left in a desk drawer, it was not "contained in a system of records," *id.*, and was not covered by the Act.

For substantially the reasons stated by the district court, we affirm.

BACKGROUND

This matter is before our court for the second time. *See Bechhoefer v. U.S. Dep't of Justice D.E.A.*, 209 F.3d 57 (2d Cir. 2000) ("*Bechhoefer I*"). Relevant facts are as follows. In the summer of 1993, Plaintiff Arthur Bechhoefer, a self-employed investment advisor in Yates County, New York and an active member of two local watchdog organizations, became concerned about reports of drug trafficking in the Keuka Lake area. Because the reports implicated a number of local notables, including at least one member of the Yates County Sheriff's Department, Bechhoefer approached the federal authorities, specifically, the Rochester branch office of the DEA.

On July 15, 1993, Bechhoefer called the DEA and spoke with Special Agent Jeffrey Gelina, to whom he began to convey his suspicions. Gelina asked Bechhoefer to memorialize his suspicions in writing, and to send him a detailed account of what he had learned. Bechhoefer alleges that in the course of that phone conversation, Agent Gelina assured him the letter would remain confidential. Two days later, Bechhoefer sent to Gelina a three-page, single-spaced letter, outlining in detail Bechhoefer's suspicions of a pattern

of drug trafficking, violence, and coverups on the part of numerous prominent local citizens. Among other things, the letter raised the suspicion that two drowning deaths, which were thought to have been alcohol-related, might in fact be connected to the drug trade. The letter mentions that the "[i]nvestigation of the recent drownings was handled by Mike Christensen, who was Richard Ackerman's right hand man" — Ackerman being a former member of the Sheriff's office and Christensen, a current member of the office. The letter expresses suspicion that Ackerman and Christensen had a significant role in the drug trade.

Immediately after receiving Bechhoefer's call, Agent Gelina discussed the matter with Special Agent Robert Nearing, who was generally responsible for Yates County matters. It is Nearing's testimony that even before the letter arrived, he called Christensen at the Yates County Sheriff's Office to discuss the allegations, and Christensen immediately deduced that Bechhoefer was the source. Upon receipt of the letter, Gelina gave it to Nearing, who ran background criminal checks on the persons mentioned. Nearing's boss, James Kenney, contacted the FBI to determine whether corroboration existed for Bechhoefer's allegations.

At Nearing's request, Gelina phoned Bechhoefer to discuss the contents of his letter. In the course of the conversation, Gelina openly discussed the individuals mentioned in the letter by name. Bechhoefer apparently believed such discussion of names on unsecure telephone lines to be grossly irresponsible, so much so that he

wondered whether Gelina was in fact a DEA agent. Bechhoefer then wrote a second letter to Gelina on July 24, 1993, requesting that Gelina and Nearing permit Bechhoefer to examine documents that displayed their credentials.

Gelina and Nearing, believing this letter to be very odd, and finding no corroboration for Bechhoefer's allegations, decided to discontinue the investigation. Nearing again contacted Christensen in late July and early August, and discussed Bechhoefer's letters. Christensen requested copies. Nearing apparently had the letters in his desk drawer among a random assortment of papers. On August 5, 1993, he faxed copies to Christensen. There is no evidence that the Bechhoefer letters, or the allegations made in them, were ever incorporated into DEA's paper or electronic files. No report of Bechhoefer's allegations was prepared. Bechhoefer's name was not entered into the Narcotics and Dangerous Drug Information System ("NADDIS") — DEA's national electronic database. Nor did any information relating to Bechhoefer become part of the DEA's Investigative Reporting and Filing System.

By reason of his first letter, Bechhoefer was prosecuted in two separate state criminal suits for "filing a false report" about the Sheriff's office, at least one of which was prosecuted by Nearing's brother-in-law Alan Reed. One suit culminated in a jury verdict in Bechhoefer's favor; the other was dismissed. Several civil law suits for defamation were also instituted against Bechhoefer, which was also ultimately dismissed.

Proceedings Below

Bechhoefer brought this action alleging violation of the Privacy Act and the First Amendment. The constitutional claim was dismissed and no appeal was taken. *See Bechhoefer v. U.S. Dep't of Justice D.E.A.*, 934 F.Supp. 535, 539-40 (W.D.N.Y. 1996). As to the claim under the Privacy Act, the district court initially granted summary judgment to the DEA on the ground that the letter in question did not meet the statutory criterion of "record" under the Privacy Act. *Id.* The Act defines a "record" as "any item, collection, or grouping of information *about an individual* that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name . . . or other identifying particular." 5 U.S.C. § 552a(a)(4) (emphasis added). The district court found that the letter in question did not satisfy this definition, because it was not "about" plaintiff, but was rather a letter written by plaintiff about others.

On appeal, we reversed. *See Bechhoefer I,* 209 F.3d 57. Noting that the circuits were split as to the correct standard for defining a "record," we followed the Third Circuit's broad test, according to which a record "encompass[es] *any* information about an individual that is linked to that individual through an identifying particular." *Quinn v. Stone,* 978 F.2d 126, 133 (3d Cir. 1992) (emphasis in original). Determining that Bechhoefer's letter, which bore a letterhead setting forth both his name and his address, satisfied the statutory definition of "record," we vacated the

grant of summary judgment and remanded. *Bechhoefer I*, 209 F.3d at 63.

On remand, after further discovery, defendant again moved for summary judgment, on two grounds: 1) that the letter was not "in a system of records" within the meaning of the statute; and 2) that in any event, defendant was able to satisfy the statutory exception for information disclosed as part of "routine use." The routine use claimed was "law enforcement and regulatory purposes." Finding that it was unclear whether the letter was faxed to the Sheriff's Office "for law enforcement and regulatory purposes," the district court denied summary judgment on that ground.

The court, however, granted the motion on the ground that the letter was not part of a "system of records." On the basis of the testimony of Gelina and Nearing, the district court determined that the letter was most probably left in Nearing's desk drawer together with unrelated materials, and that no file was opened concerning Bechhoefer or his allegations. The letter was not classified under any filing system, either manual or electronic, and was not subject to retrieval by name or identification number. The only way Nearing could locate it was to leaf through his drawer.

The district court concluded that the letter never became part of DEA's "system of records," within the meaning of the Act. The disclosure to Christensen was, therefore, not a violation of § 552a(b). Bechhoefer appeals that decision.

DISCUSSION

The Privacy Act's restrictions on disclosure do not apply to every record under an agency's control or in its possession. They apply only to a record "which is contained in a system of records." 5 U.S.C. § 552a(b). The Act defines a "system of records" as

> a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

5 U.S.C. § 552a(a)(5). As the Guidelines for Implementing Section 552a established by the Office of Management and Budget further specify:

> The definition of "system of records" limits the applicability of some of the provisions of the Act to "records" which are maintained by an agency, retrieved by individual identifier (i.e., there is an indexing or retriev[a]l capability using identifying particulars . . . built into the system), *and* the agency does, in fact, retrieve records about individuals by reference to some personal identifier.
>
> . . . .
>
> The phrase ". . .under the control of the agency . . ." was intended to accomplish two separate purposes: (1) to determine possession and establish accountability; and (2) *to separate agency records which are maintained personally by employees of an agency but which are not agency records.*

Privacy Act Guidelines, *reprinted in* Legislative History of the Privacy Act of 1974: Source Book on Privacy 1027 (1976) (emphasis added). It follows that the prescriptions of the Act do not come into play whenever a document falls into the possession of an employee of a covered agency. It is only when the document becomes incorporated into a record-keeping system under the agency's control that the Act's prescriptions apply. And as for documents like Bechhoefer's letter, which the agency regards as irrelevant to its mission and therefore never incorporates into its record-keeping system, but which are forwarded to another agency, discarded, or left in an employee's desk drawer, such documents never become part of the agency's system of records.

Bechhoefer, pointing to the fact that his name was on the letterhead of his letter, surmises that when Agent Nearing found it in his desk drawer, he must have done so by looking at the name Bechhoefer on the letterhead. He argues on that basis that the letter was retrieved "by the name of the individual" and therefore was maintained within a "system of records." If that were the meaning of the statute, a random assortment of documents left in a drawer would be part of the agency's "system of records."

To understand how inappropriate such an interpretation of the Act would be, it is helpful to consider the various obligations the Act establishes with respect to systems of records. First, pursuant to § 552a(e)(4), "Each agency that maintains a system of records [is required to] . . . publish in the Federal Register" detailed information

concerning the nature and scope of the system. Second, under the Act's so-called access provisions, "Each agency that maintains a system of records shall — (1) upon request by an individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him . . . to review the record and have a copy made of all or any portion thereof in a form comprehensible to him." § 552a(d)(1). Third, there is the obligation that is the subject of this litigation: the obligation not to disclose records without the consent of the individual to whom the record pertains. § 552a(b).

If, as appellant argues, an agency's system of records includes not only the documents and entries that are classified in the agency's paper and electronic files, but also every scrap of paper left in an employee's pocket or desk drawer upon a determination that it does not have sufficient pertinence to the agency's mission to warrant inclusion in the agency's filing system, compliance with the first and second objectives established by the Act would be virtually impossible. Under § 552a(e)(4), in its publication in the Federal Register, in addition to describing its formal record keeping system, the agency would be compelled to list the desk drawers and coat pockets where irrelevant documents were left — a requirement that cannot have been intended. Even more problematic is that under § 552a(d)(1), whenever an individual requested access to "any information pertaining to him which is contained in the system," the agency would be obligated not only to search under his name in the agency's structured files, but also to search every desk drawer and coat pocket in order to discharge its statutory obligation

to make all such material available to him. Once again, it is inconceivable that Congress intended to impose such an obligation. The Act clearly envisions that an agency can satisfy its obligation simply and inexpensively by searching its structured files under the individual's name or other identifying symbol. We conclude that an assortment of papers excluded from the agency's formal files because they are deemed not relevant to the agency's mission and left in a desk drawer are not part of the agency's system of records, to which the obligations of the Act apply.

We note that other circuits to have considered variations of the question before us have reached conclusions similar to ours. *See, e.g., Boyd v. Secretary of the Navy*, 709 F.2d 684, 686-87 (11th Cir. 1983) (because memorandum "was kept within a random-type file and could only by retrieved by searching through the file," it was not in a "system of records"); *see also Bettersworth v. FDIC*, 248 F.3d 386, 391-92 (5th Cir. 2001) (records filed under names of financial institutions not part of system of records even though they contained information about individuals); *Gowan v. U.S. Dep't of the Air Force*, 148 F.3d 1182. 1191 (10th Cir. 1998) (materials contained in a general disciplinary file labeled "Ethics" not within a system of records because file not keyed to plaintiff); *Hudson v. Reno*, 130 F.3d 1193, 1206 (6th Cir. 1997), ("[N]otes about Plaintiff's misconduct which were kept in a locked drawer and labeled the 'First Assistant's' files" not in a system of records because not retrievable under plaintiff's name), *abrogated on other*

grounds by Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 848 (2001).[1]

CONCLUSION

The judgment of the district court is affirmed.

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[1] We need not consider the defendant's further argument that the statutory formulation applies only to a system designed to permit retrieval by name, and is not satisfied merely because in a single instance a document, otherwise classified, was found by looking for the individual's name. *Compare Henke v. U.S. Dep't of Commerce*, 83 F.3d 1453 (D.C. Cir. 1996) *with Williams v. Dep't of Veteran Affairs*, 104 F.3d 670 (4th Cir. 1997). Whatever the meaning of the Act may be in this regard as to records that are maintained in a structured system, we conclude that a "system of records" does not encompass pieces of paper left in desk drawers because the agency has deemed them insufficiently relevant to the agency's mission to warrant their inclusion in the agency's files.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Bechhoefer

Plaintiff(s)

v. 6:95-cv-06326

U.S. Dept. Justice

Defendant(s)

PLEASE take notice of the entry of an ORDER filed on 10/25/01, of which the within is a copy, and entered 10/26/01 upon the official docket in this case. (Document No. 40.)

Dated: Rochester, New York
October 26, 2001

RODNEY C. EARLY, Clerk
U.S. District Court
Western District of New York
2120 U.S. Courthouse
100 State Street
Rochester, New York 14614

Enclosure

TO:

Anthony J. Adams, Jr., Esq.
Brian M. McCarthy, Esq.

FILED
01 OCT 25 [illegible]
U.S. DISTRICT COURT
W.D.N.Y. ROCHESTER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ARTHUR S. BECHHOEFER,

Plaintiff,

DECISION
AND ORDER
95-CV-6326L

v.

U.S. DEPARTMENT OF JUSTICE, Drug Enforcement Administration, ROBERT NEARING, JEFFREY GELINA,

Defendants.

INTRODUCTION

This is an action under the Privacy Act ("the Act"), 5 U.S.C. § 552a. Plaintiff, Arthur S. Bechhoefer ("Bechhoefer"), alleges that in 1993, Robert Nearing and Jeffery Gelina, agents of defendant Drug Enforcement Administration ("DEA") of the United States Department of Justice ("DOJ"), unlawfully disclosed to the Yates County (New York) Sheriff's Department a letter that plaintiff had sent to Gelina containing allegations of suspected drug activities in Yates County. The letter also alleged, or at least insinuated, that persons within the Sheriff's Department may have been involved in that drug activity and that they could

not be trusted with any confidential information concerning that activity.

It is conceded by the DEA that Agent Nearing, upon request, turned Bechhoefer's letter over to an investigator with the Yates County Sheriff's Department, Michael J. Christensen. As a result of that disclosure, plaintiff was charged by the Yates County District Attorney with falsely reporting an incident, in two separate criminal actions. Plaintiff was also sued, apparently for defamation, in three actions in state court. Plaintiff was acquitted on one set of criminal charges, and the other was dropped. The civil actions were eventually dismissed as well.

Plaintiff commenced this action on July 14, 1995. The complaint alleges that defendant's disclosure of the letter to the Sheriff's Department violated the Privacy Act, and that plaintiff suffered harm as a result. In an August 2, 1996, Decision and Order, familiarity with which is assumed, the court granted summary judgment in favor of defendant on the ground that plaintiff's letter was not a "record" for purposes of the Act. *Bechhoefer v. United States Dep't of Justice, Drug Enforcement Admin.*, 934 F.Supp. 535 (W.D.N.Y. 1996). On appeal, the Court of Appeals vacated this court's judgment and remanded for further proceedings. The Second Circuit held that the term "'record' under the Privacy Act has 'a broad meaning encompassing,' at the very least, any personal information 'about an individual that is linked to that individual through an identifying particular.'" *Bechhoefer v. United States Dep't of Justice, Drug Enforcement Admin.*, 209 F.3d 57, 62 (2d Cir. 2000) (quoting *Quinn v. Stone*, 978

F.2d 126, 133 (3d Cir. 1992)). Applying that test to the facts of this case, the court concluded that Bechhoefer's letter was indeed a "record" within the meaning of the Act. *Id.*

The Court of Appeals declined, however, to consider either of the two alternative grounds for affirmance advanced by defendant: (1) that the letter was not contained within a "system of records" as defined by § 552a(a)(5) and as required by the plain language of § 552a(b); or (2) that disclosure of the letter was permissible pursuant to an exception in § 552a(b)(3) for a "routine use." The Court of Appeals directed that the district court should consider those alternative arguments in the first instance, and therefore remanded the case for further proceedings on those issues. *Id.* at 63.

Following remand, the DEA renewed its motion for summary judgment, and the parties have submitted additional briefs and evidence concerning the "system of records" and "routine use" issues. This Decision and Order constitutes my ruling on those issues.

DISCUSSION

I. "System of Records"

The Act prohibits government agencies from disclosing "any record which is contained in a system of records" without the consent of the individual to whom the record pertains, with certain exceptions, one of which — disclosure for a "routine use" — will be discussed below. 5 U.S.C. § 552a(b). "System of records" is defined as "a group of any records under the control of any agency from which

information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5).

"It is clear [that] the Privacy Act does not apply where documents or information at issue are not contained in the agency's 'system of records.'" *Manuel v. Veterans Admin. Hosp.*, 857 F.2d 1112, 1117 (6th Cir. 1988), *cert. denied*, 489 U.S. 1055 (1989). For a record to be part of a system of records, § 552a(a)(5) requires that the record be retrieved by the name or some other indentifying particular of the individual to whom it relates. *See Henke v. United States Dep't of Commerce*, 83 F.3d 1453, 1461 n. 2 (D.C.Cir. 1996) (retrieval *capability* is not sufficient to create a system of records; to be in a system of records, a record must in practice be retrieved by an individual's name or other personal identifier); *Baker v. Department of Navy*, 814 F.2d 1381, 1384-85 (9th Cir.) (Act's definition of "system of records" "makes coverage under the Act dependent upon the method of retrieval of a record rather than its substantive content"), *cert. denied*, 484 U.S. 963 (1987).

In determining whether a document is part of a system of records, therefore, courts have looked at the method by which the information was retrieved. Documents not retrieved by the plaintiff's name or other identifier have been held not to be part of a system of records. *See, e.g., Bettersworth v. F.D.I.C.*, 248 F.3d 386, 391-92 (5th Cir. 2001) (Federal Reserve Bank records maintained in files referencing the names of banks with which plaintiff was associated, rather than plaintiff personally, were not

maintained in system of records retrievable by plaintiff's name, and thus were not covered by the Privacy Act), *petition for cert. filed,* 70 U.S.L.W. 3193 (Sept. 10, 2001); *Gowan v. United States Dep't of Air Force*, 148 F.3d 1182, 1191 (10th Cir.) (file marked "Ethics," which contained information about various people and investigations of ethics issues, including information concerning investigation of activities of plaintiff, did not bear personal identifier of plaintiff, so that file was not part of "system of records' for purposes of Privacy Act), *cert. denied*, 525 U.S. 1042 (1998); *Manuel*, 857 F.2d at 1117 (documents generated by undercover investigators were not indexed under any name, and were therefore not part of any "system of records" within meaning of Privacy Act); *Cuccaro v. Secretary of Labor*, 770 F.2d 355, 359-60 (3d Cir. 1985) (documents relating to agency's investigation of accident involving plaintiff were not tied to plaintiff's name and thus were not covered by the Privacy Act); *Wren v. Heckler*, 744 F.2d 86, 90 (10th Cir. 1984) (records not covered by the Privacy Act because they were not retrievable by the plaintiff's name, even though information contained in the records related to plaintiff).

In the case at bar, plaintiff contends that the letter he sent to Gelina was contained in a system of records because someone at the DEA, probably Nearing, must have retrieved it by reference to plaintiff's name when the letter was disclosed to the Sheriff's Department. The evidence indicates that Nearing had spoken about the letter in a telephone

conversation with Investigator Christensen.[1] At some point, Christensen asked Nearing to fax him a copy of the letter, which Nearing did. Plaintiff asserts that Nearing must have retrieved the letter by plaintiff's name in order to fax it to Christensen.

Nearing testified at his deposition that he believed that Gelina had given him the letter after it was received at the DEA office in Rochester, where Nearing and Gelina were based. Nearing did not recall specifically what he did with the letter or where he kept it at all times, but he stated that he probably either gave it back to Gelina or kept it in his desk drawer during 1993, when the events at issue occurred. Affidavit of Brian M. McCarthy (Docket Item 36), Ex. 2 at 20. Gelina testified at a deposition taken in connection with the state court defamation actions that after reviewing the letter, he gave it to Nearing. Taken together, Nearing's and Gelina's testimony suggests that Nearing most likely kept the letter in his desk. Affidavit of Anthony J. Adams, Jr. (Docket Item 38), Ex. A at 44.

Nearing also testified about DEA practices for opening case and investigatory files, and the way that such files would be stored, marked and retrieved. He stated,

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[1] Plaintiff's letter described Christensen as having been the "right hand man" of Richard Ackerman, the former Undersheriff of Yates County, who plaintiff said "may [have] be[en] involved in the distribution of drugs ... ." Adams Supp. Aff., Ex. E. The letter also stated that Christensen had handled the investigation of two recent drownings in Yates County. Plaintiff opined that the drownings were drug-related homicides, and intimated that the "investigation" had in fact been a coverup.

however, that neither he nor anyone else in his office ever actually opened or created a file concerning plaintiff of any of plaintiff's communications with the DEA. McCarthy Aff., Ex. 2 at 20, 25.

All that the record shows, then — and plaintiff does not appear to contend otherwise — is that Nearing put the letter in his desk drawer with other assorted, unrelated documents. That fact is further made evident from the following passage from his deposition:

> Q. I take it that the documents kept in that drawer were more or less random documents? They did not necessarily have any relationship to one another?
>
> A. Yes.
>
> Q. If, for example, Bechhoefer's letter was in there, other correspondence from other unrelated individuals might have been in there as well?
>
> A. Yes.
>
> Q. If you were asked to retrieve letters from that drawer, there really was no filing system, right? They were just in there?
>
> A. Correct.
>
> Q. So you would access them by whatever reference the inquirer had made? If somebody said, "I want the letters Bechhoefer sent," you

would have to go in there and look for Bechhoefer's name, right?

A. Yes.

McCarthy Aff., Ex. 2 at 28-29.

In my view, based on the language of the statute itself and the case law construing § 552a(a)(5), this evidence does not support a finding that plaintiff's letter was contained in a system of records for purposes of the Act. The letter never became incorporated into the DEA's formal recordkeeping system, nor was it even part of an informal system maintained by Nearing or anyone else at the DEA.

As stated, the language of the Act itself supports this conclusion. The statutory definition of "system of records" is a commonsense one: "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." This definition could include anything from a filing cabinet arranged alphabetically by the subject's name, to a computer program capable of retrieving records from a database when a user enters an individual's name or other identifying information. All such arrangements, however, are plainly "systematic," in the sense that they are designed to permit retrieval of the records they contain by reference to the subject's name or some other identifier. Anyone with an understanding of the system, and who possesses the relevant identifier, could retrieve a record relating to a particular person from that system with little difficulty. *See Stewart v.*

F.B.I., No. CV-97-1595, 2000 WL 281693 10 (D.Or. Mar. 15, 2000) ("This requirement [that a record is part of a system of records only if it is labeled with the plaintiff's name or other specific identifier of the plaintiff] appears to be designed to ensure that the record is an agency record that is easily retrievable by more than one person"), *order withdrawn pursuant to stipulation*, 2000 WL 739253 (D.Or. May 12, 2000).

In contrast, the only evidence here is that plaintiff's letter was simply lying in a desk drawer along with other, totally unrelated documents. The only way to retrieve it was for Nearing — knowing from memory that he had placed the letter in the drawer — to thumb through the papers in his drawer, one by one, until he found what he was looking for. That Nearing may have kept a small enough number of documents in his desk to make this practicable should not obscure the fact that this was not a "system" as that term as defined in the Act, any more than if Nearing had kept hundreds of documents in this unorganized fashion. Even assuming that Nearing himself had some knowledge of the general nature of the documents that he kept in his desk, *e.g.*, documents that did not relate to an existing file, plainly those documents were *not* maintained in a system keyed to individuals' names or other identifying particulars. *See Boyd v. Secretary of the Navy*, 709 F.2d 684, 686-87 (11th Cir. 1983) (memorandum was not in a system of records, since it was not keyed to plaintiff's name or other identifier; "It was kept within a random-type file and could only be retrieved by

searching through the file"), *cert. denied*, 464 U.S. 1043 (1984)[2]

Plaintiff emphasizes that when Nearing retrieved the letter, he presumably identified it by looking at plaintiff's name on the letter. Plaintiff contends that the letter therefore constitutes a record "retrieved by the name of the individual" to whom it relates. Plaintiff, however, confuses *retrieving* a document with *identifying* the document. If one is looking for a letter from a particular person, one will probably look at the name on the letter in order to identify it as the letter being sought. If that letter is in a stack of unrelated, miscellaneous documents, however, it cannot be said to be contained within a group of records organized in such a fashion that information can be retrieved by an individual's name.

Courts in similar cases have held that a system of records did not exist where a document or set of documents was kept with other unrelated papers or where it was retrieved simply from a person's memory of where it was kept. *See, e.g., Hudson v. Reno*, 130 F.3d 1193, 1206 (6th Cir. 1997) ("Plainly, Dedrick's notes about Plaintiff's misconduct which were kept in a locked drawer and labeled the 'First

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[2] Although the Second Circuit has disagreed with the test set forth by the Eleventh Circuit in *Boyd* for whether an item qualifies as a record within the meaning of the Privacy Act, *see Bechhoefer*, 209 F.3d at 60, the Second Circuit expressed no opinion about what constitutes a system of records. *Id.* at 63. Since the court in *Boyd* held that the memorandum at issue in that case *was* a record, its holding that the memorandum was not part of a *system* of records is not affected in any way by the Eleventh Circuit's use of a different standard from that adopted by the Second Circuit for determining what constitutes a record.

Assistant's' files do not fall within [the] definition" of "system of records," since they were not retrievable under plaintiff's name), *cert. denied,* 525 U.S. 822 (1998); *Smith v. Henderson,* No. C-96-4665, 1999 WL 1029862, No. C-96-4665 (N.D.Cal. 1999) (hiring coordinator's "never-never drawer," which she described as a locked drawer containing a file folder in which she kept her own notes or various other pieces of paper relating to "special circumstances" hires, was not a "system of records" because she did not utilize the drawer to systematically file and retrieve information about individuals indexed by their names), *aff'd,* __F.3d__, 2001 WL 1019557 (9th Cir. 2001) (unreported decision); *Fagot v. FDIC*, 584 F.Supp. 1168, 1174 (D.P.R. 1984) (plaintiff's unlawful-disclosure claim under Privacy Act failed, because decision to search in particular file of particular bank was the result of local examiner's personal recollection of plaintiff's involvement with that bank as director and attorney, and there was no indication that this information was retrieved from a system of records keyed to plaintiff's name or other personal identifier); *cf. Bowyer v. United States Dep't of Air Force*, 804 F.2d 428, 431-32 (7th Cir. 1986) (fact issues existed about whether memos relating to plaintiff were retrievable by reference to his name, where plaintiff's supervisor claimed that memos for all employees were kept in one plain, unlabeled folder, but witness testified that he found folder with his name on it on supervisor's desk that contained memos pertaining only to witness, and that he saw other file folders marked with different names).

Were plaintiff's interpretation of the Act to be accepted, the disclosure provisions of the Privacy Act would

extend to virtually any and all pieces of paper, no matter how those documents were stored. If that were Congress's intent, however, there would have been no need to modify "any record" in § 552a(b) by adding the phrase "which is contained in a system of records." Plaintiff's construction of the statute, then, reads that modifying phrase completely out of § 552a(b).

This is also apparent from an examination of the Act's access provisions, dealing with the right of individuals to gain access to their own records. Like the disclosure provisions of § 552a(b), the access provisions in § 552a(d) apply to "[e]ach agency that maintains a system of records." In general, an individual has the right to see and review his own record kept within a system of records, and, if he disagrees with its contents, to request that the record be amended. 5 U.S.C. § 552a(d)(1), (d)(2).

In applying § 552a(d), however, courts have held that the "qualifying language in the statute [limiting access to records contained in a "system of records"] reflects a statutory compromise between affording individuals access to those records relating directly to them and protecting federal agencies from the burdensome task of searching through agency records for mere mention of an individual's name. Many of the published Privacy Act cases are aimed at giving meaning to this statutory requirement." *Bettersworth,* 248 F.3d at 391 (collecting cases). In other words, agencies are not obligated to comb through *all* of their records — or to require their employees to sift through all the papers in their possession — every time an individual makes a request for

his record. The agencies need only provide those records that are contained in a system of records and are retrieved by reference to the individual making the request. *See also Connelly v. Comptroller of the Currency,* 673 F.Supp. 1419, 1424 (S.D.Tex. 1987) ("Clearly, the explicit restriction to a 'system of records' [in § 552(d)] is to prevent the creation of a duty on the part of a defendant to comb its records for mention of a requestor's name, or alternatively, to develop elaborate cross-referencing systems"), *rev'd on other grounds*, 876 F.2d 1209 (5th Cir. 1989); *Fagot v. FDIC*, 584 F. Supp. 1168, 1174 (D.P.R. 1984) (system of records requirement "responds to practical considerations for the burden imposed on agencies in having to rummage through tons of papers identified by all sorts of subject matters in order to locate information related to a requestor can reach unsurmountable and possibly absurd proportions"); *Ferri. v. United States Dep't of Justice*, 573 F.Supp. 852, 858 (W.D.Pa. 1983) ("access under the Privacy Act is limited to records that can be retrieved by certain identifying marks used by the agency, and the agency is not required to search each and every record it maintains in order to discover material that might fulfill a request"); *see also Baker*, 814 F.2d at 1384 (agency guidelines, regulations and case law "provide overwhelming support for using a record's method of retrievability to determine the scope of accessibility").

Thus, on the facts presented here, had plaintiff in the case at bar submitted a request for his record with the DEA, the DEA would not have been obligated under the Privacy Act to locate and provide him with his letter to Gelina, because that letter was not part of a system of records. *See*

Baker, 814 F.2d at 1385 ("an individual's ability to obtain access to a record . . . because of personal knowledge of its existence in a certain file, will not provide that individual with access to the record or to any remedies under the Privacy Act," unless the record is individually keyed to the requester). No search of the DEA's system of records, keyed to plaintiff's name or other identifying information, would be expected to have turned up the letter, and indeed defendant states, and plaintiff does not dispute, that an actual search of the DEA's automated indexing system, NADDIS, yielded no records retrievable by plaintiff's name. Declaration of Patsy L. Turner (Docket Item 11 Ex. 1) ¶¶ 6, 7.

In addition, this is not a case where the agency was in fact maintaining a system of records, but simply did not publicly acknowledge that fact by publishing a notice of the system's existence in the Federal Register, as required by the Act. *See* 5 U.S.C. § 552a(e); *Henke*, 83 F.3d at 1459 (agency may not "simply refuse to acknowledge that it maintains a system of records and thereby insulate itself from the reach of the Privacy Act. To the contrary, if there is evidence that an agency in practice retrieves information about individuals by reference to their names, the mere fact that the agency has not acknowledged that it operates a system of records will not protect it from the statutory consequences of its actions"). There was never any system here of which this letter became a part.

Nor has there been any showing here that Nearing, or anyone else at the DEA, had any duty to enter plaintiff's letter into a system of records. As explained in the

Supplemental Declaration of Kevin J. Janet, an Attorney Advisor in the Litigation Unit, Freedom of Information Section at the DEA, not every piece of paper that comes into a DEA office has to be entered into the DEA's system of records. Agents are instructed to strike a balance between maintaining a thorough indexing system on the one hand, and avoiding "cluttering [that system] with information of no practical value" on the other. Docket Item 39 ¶ i2 (quoting DEA Agents Manual, § 6233.32 — Criteria for Indexing). Here, the evidence indicates that Nearing hung onto plaintiff's letter for a while to see if anything of value would come out of it, but eventually decided that plaintiff's allegations of drug activity were not worth pursuing, and at no time did he believe that the letter, or his and Gelina's other contacts with plaintiff, made it worth opening a case file or general file.

In short, all that transpired here was that Gelina gave plaintiff's letter to Nearing, who stuck it in his desk drawer along with a number or other miscellaneous documents, and later retrieved it from that drawer, from his own memory and personal knowledge of where he kept it, so that he could fax it to Christensen. At no time during these events did the letter ever become indexed in any way that would have made it possible to retrieve it by plaintiff's name or other identifying information. Accordingly, the letter never became a part of a system of records for purposes of the Privacy Act, and its disclosure to Christensen did not violate the Act.

II. "Routine Use" Exception

Defendant also contends that disclosure of plaintiff's letter was permissible as a "routine use." The Act sets forth certain exceptions to the general prohibition of disclosure without consent in § 552a(b). Specifically, § 552a(b)(3) permits disclosure "for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this secton."

Section 552a(a)(7) defines "routine use" as meaning, "with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected." In addition, § 552a(e)(4)(D) requires the agency to publish in the Federal Register a notice of existence and character of the agency's system of records, including "each routine use of the records contained in the system, including the categories of users and the purpose of such use." The agency must also inform each individual whom it asks to supply information of the routine uses that may be made of the information. 5 U.S.C. § 552a(e)(3)(C); *Covert v. Harrington,* 876 F.2d 751, 755-56 (9th Cir. 1989).

The DOJ has promulgated regulations in the Federal Register concerning the routine uses of information maintained by the DEA. The regulations in effect in 1993, when the relevent events in this case occurred, include among routine uses disclosure to "[s]tate and local law enforcement and regulatory agencies," "for law enforcement and regulatory purposes." Defendant's Memorandum of Law

(Docket Item 11), Ex. 2 at 19. Privacy Act of 1974; Systems of Records, 52 Fed. Reg. 47,182, 47,211 (Dec. 11, 1987).

Defendant contends that plaintiff's letter, which contained allegations of criminal activity, was passed on to the Sheriff's Department for "appropriate action." Defendant's Memorandum of Law at 6. Defendant also contends that the disclosure of the letter was compatible with the purpose for which it was maintained, *ie.* the investigation of criminal activity.

I find this argument unpersuasive, and at the very least it is not a sufficient basis upon which to grant summary judgment in favor of defendant. Nearing testified that after receiving the letter, he contacted the Sheriff's Department, and spoke to Christensen to let him know that the DEA had received a letter containing allegations of drug activity in Yates County. Nearing did not tell Christensen that plaintiff was the author of the letter. When Nearing described the contents of the letter, however, Christensen told him that Christensen was aware of a "political" situation going on in Yates County, and that he believed that Bechhoefer had written the letter. Nearing neither confirmed nor denied the truth of Christensen's suspicion. Adams Supp. Aff. (Docket Item 38), Ex. C at 36-37.

Nearing also testified that by the time he faxed the letter to Christensen, Nearing was satisfied that there was no merit to plaintiff's allegations of drug activity. *Id.* at 52. Nearing did not have the impression that Christensen intended to investigate plaintiff's allegations further; he believed that Christensen "just wanted a copy of the letter to

see the information contained on it." *Id.* at 49. The only real reason that Nearing could give for faxing the letter to Christensen was that Christensen "requested to look at the information." Adams Supp. Aff., Ex. D at 37.

Christensen himself testified (again in connection with one of the civil suits in state court) that he told Nearing that Christensen "had no doubt that it was Art Bechhoefer that was calling" Nearing, and that Christensen gave Nearing "a brief rundown of the ongoing feud that has been going on for years between Nicolo [one of the persons named in plaintiff's letter] and Bechhoefer." Adams Supp. Aff., Ex. F at 54-55. Based on his knowledge of plaintiff, Christensen did not believe there was any truth to his allegations. *Id.* at 61, 64. Christensen testified that he wanted to see a copy of the letter because he considered Bechhoefer a potential suspect in a recent fire at Nicolo's home. Christensen testified that he told Nearing of that fact when he asked Nearing to fax him the letter. Adams Supp. Aff., Ex. G at 33.

Based on this evidence, I certainly do not believe that defendant is entitled to summary judgment based on the routine-use exception, and I have my doubts about whether the evidence would even support a verdict for defendant at trial on that ground. Even assuming that Christensen's stated interest in the letter in connection with the fire at Nicolo's house constituted a valid law enforcement purpose for disclosure of the letter, it is difficult to see how that disclosure could be said to have been compatible with the purpose for which the letter was collected by the DEA. Nearing's and Gelina's initial interest in the letter was to

investigate plaintiff's accusations of illegal drug activity by others; Christensen's interest was in investigating possible unlawful, non-drug-related activity by the plaintiff himself. Even if Christensen did not communicate the reason for his interest in the letter to Nearing, there is no evidence in the record suggesting that Nearing had any reason to believe that Christensen wanted to follow up on plaintiff's allegations. I therefore decline to grant summary judgment for defendant on this ground.

CONCLUSION

Defendant's motion for summary judgment (Docket Item 10) is granted, and the complaint is dismissed.

IT IS SO ORDERED.

s/ David G. Larimer
DAVID G. LARIMER
CHIEF JUDGE
UNITED STATES DISTRICT COURT

Dated: Rochester, New York
October 25, 2001.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
40 Foley Square
New York, NY 10007

At a stated Term of the united States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12 day of Feb Two Thousand Three

Stamp: UNITED STATES COURT OF APPEALS
FILED FEB 12 2003
Roseann B. McKechnie, CLERK
SECOND CIRCUIT

ARTHUR S. BECHHOEFER,

Plaintiff-Appellant,

v. 01-6244

U.S. DEPARTMENT OF JUSTICE, Drug Enforcement Administration,

Defendant-Appellee,

ROBERT NEARING, JEFFREY GELINA,

Defendants.

A petition for rehearing and a petition for rehearing en banc having been filed herein by the Appellant Arthur S. Bechhoefer,

Upon consideration by the panel that decided the appeal, it is Ordered that the petition for rehearing is **DENIED**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
Roseann B. McKechnie, Clerk
By: s/Arthur M. Heller,
Arthur M. Heller,
Administrative Attorney

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§ 552a. Records maintained on individuals

(a) Definitions. — For purposes of this section —

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13;

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected;

(8) the term "matching program" —

(A) means any computerized comparison of —

(i) two or more automated systems of records or a system of records with non-Federal records for the purpose of —

(I) establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefit programs, or

(II) recouping payments or delinquent debts under such Federal benefit programs, or

(ii) two or more automated Federal personnel or payroll systems of records or a system of Federal personnel or payroll records with non-Federal records,

(B) but does not include —

(i) matches performed to produce aggregate statistical data without any personal identifiers;

(ii) matches performed to support any research or statistical project, the specific data of which may not

be used to make decisions concerning the rights, benefits, or privileges of specific individuals;

(iii) matches performed, by an agency (or component thereof) which performs as its principal function any activity pertaining to the enforcement of criminal laws, subsequent to the initiation of a specific criminal or civil law enforcement investigation of a named person or persons for the purpose of gathering evidence against such person or persons;

(iv) matches of tax information (I) pursuant to section 6103(d) of the Internal Revenue Code of 1986, (II) for purposes of tax administration as defined in section 6103(b)(4) of such Code, (III) for the purpose of intercepting a tax refund due an individual under authority granted by section 404(e), 464, or 1137 of the Social Security Act; or (IV) for the purpose of intercepting a tax refund due an individual under any other tax refund intercept program authorized by statute which has been determined by the Director of the Office of Management and Budget to contain verification, notice, and hearing requirements that are substantially similar to the procedures in section 1137 of the Social Security Act;

(v) matches —

(I) using records predominantly relating to Federal personnel, that are performed for routine administrative purposes (subject to guidance

provided by the Director of the Office of Management and Budget pursuant to subsection (v)); or

(II) conducted by an agency using only records from systems of records maintained by that agency;

if the purpose of the match is not to take any adverse financial, personnel, disciplinary, or other adverse action against Federal personnel [FN1]

(vi) matches performed for foreign counterintelligence purposes or to produce background checks for security clearances of Federal personnel or Federal contractor personnel;

(vii) matches performed incident to a levy described in section 6103(k)(8) of the Internal Revenue Code of 1986; or

(viii) matches performed pursuant to section 202(x)(3) or 1611(e)(1) of the Social Security Act (42 U.S.C. 402(x)(3), 1382(e)(1));

(9) the term "recipient agency" means any agency, or contractor thereof, receiving records contained in a system of records from a source agency for use in a matching program;

(10) the term "non-Federal agency" means any State or local government, or agency thereof, which receives records contained in a system of records from a source agency for use in a matching program;

(11) the term "source agency" means any agency which discloses records contained in a system of records to be used in a matching program, or any State or local government, or agency thereof, which discloses records to be used in a matching program;

(12) the term "Federal benefit program" means any program administered or funded by the Federal Government, or by any agent or State on behalf of the Federal Government, providing cash or in-kind assistance in the form of payments, grants, loans, or loan guarantees to individuals; and

(13) the term "Federal personnel" means officers and employees of the Government of the United States, members of the uniformed services (including members of the Reserve Components), individuals [FN2] entitled to receive immediate or deferred retirement benefits under any retirement program of the Government of the United States (including survivor benefits).

(b) Conditions of disclosure. — No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be —

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an

individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office;

(11) pursuant to the order of a court of competent jurisdiction; or

(12) to a consumer reporting agency in accordance with section 3711(e) of title 31.

(c) Accounting of certain disclosures. — Each agency, with respect to each system of records under its control, shall —

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of —

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the

record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) **Access to records.** — Each agency that maintains a system of records shall —

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and —

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of

receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either —

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) **Agency requirements.** — Each agency that maintains a system of records shall —

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual —

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records, which notice shall include —

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained;

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency; and

(12) if such agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting

such program, publish in the Federal Register notice of such establishment or revision.

(f) Agency rules. — In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall —

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each

individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall biennially compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g)(1) Civil remedies. — Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs

reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of —

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any

civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) Rights of legal guardians. — For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(i)(1) Criminal penalties. — Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

(j) General exemptions. — The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of

records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is —

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(k) Specific exemptions. — The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is —

(1) subject to the provisions of section 552(b)(1) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however*, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under

section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(*l*)(1) **Archival records.** — Each agency record which is accepted by the Archivist of the United States for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Archivist of the United States shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the Federal Register.

(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of

this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

(m)(1) Government contractors. — When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

(2) A consumer reporting agency to which a record is disclosed under section 3711(e) of title 31 shall not be considered a contractor for the purposes of this section.

(n) Mailing lists. — An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(o) Matching agreements. — (1) No record which is contained in a system of records may be disclosed to a recipient agency or non-Federal agency for use in a computer matching program except pursuant to a written agreement between the source agency and the recipient agency or non-Federal agency specifying —

(A) the purpose and legal authority for conducting the program;

(B) the justification for the program and the anticipated results, including a specific estimate of any savings;

(C) a description of the records that will be matched, including each data element that will be used, the approximate number of records that will be matched, and the projected starting and completion dates of the matching program;

(D) procedures for providing individualized notice at the time of application, and notice periodically thereafter as directed by the Data Integrity Board of such agency (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)), to —

(i) applicants for and recipients of financial assistance or payments under Federal benefit programs, and

(ii) applicants for and holders of positions as Federal personnel,

that any information provided by such applicants, recipients, holders, and individuals may be subject to verification through matching programs;

(E) procedures for verifying information produced in such matching program as required by subsection (p);

(F) procedures for the retention and timely destruction of identifiable records created by a recipient agency or non-Federal agency in such matching program;

(G) procedures for ensuring the administrative, technical, and physical security of the records matched and the results of such programs;

(H) prohibitions on duplication and redisclosure of records provided by the source agency within or outside the recipient agency or the non-Federal agency, except where required by law or essential to the conduct of the matching program;

(I) procedures governing the use by a recipient agency or non-Federal agency of records provided in a matching program by a source agency, including procedures governing return of the records to the source agency or destruction of records used in such program;

(J) information on assessments that have been made on the accuracy of the records that will be used in such matching program; and

(K) that the Comptroller General may have access to all records of a recipient agency or a non-Federal agency that the Comptroller General deems necessary in order to monitor or verify compliance with the agreement.

(2)(A) A copy of each agreement entered into pursuant to paragraph (1) shall —

(i) be transmitted to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives; and

(ii) be available upon request to the public.

(B) No such agreement shall be effective until 30 days after the date on which such a copy is transmitted pursuant to subparagraph (A)(i).

(C) Such an agreement shall remain in effect only for such period, not to exceed 18 months, as the Data Integrity Board of the agency determines is appropriate in light of the purposes, and length of time necessary for the conduct, of the matching program.

(D) Within 3 months prior to the expiration of such an agreement pursuant to subparagraph (C), the Data Integrity Board of the agency may, without additional review, renew the matching agreement for a current, ongoing matching program for not more than one additional year if —

(i) such program will be conducted without any change; and

(ii) each party to the agreement certifies to the Board in writing that the program has been conducted in compliance with the agreement.

(p) Verification and opportunity to contest findings. — **(1)** In order to protect any individual whose records are used in a matching program, no recipient agency, non-Federal agency, or source agency may suspend, terminate, reduce, or make a final denial of any financial assistance or payment under a Federal benefit program to such individual, or take other adverse action against such

individual, as a result of information produced by such matching program, until —

(A)(i) the agency has independently verified the information; or

(ii) the Data Integrity Board of the agency, or in the case of a non-Federal agency the Data Integrity Board of the source agency, determines in accordance with guidance issued by the Director of the Office of Management and Budget that —

(I) the information is limited to identification and amount of benefits paid by the source agency under a Federal benefit program; and

(II) there is a high degree of confidence that the information provided to the recipient agency is accurate;

(B) the individual receives a notice from the agency containing a statement of its findings and informing the individual of the opportunity to contest such findings; and

(C)(i) the expiration of any time period established for the program by statute or regulation for the individual to respond to that notice; or

(ii) in the case of a program for which no such period is established, the end of the 30-day period beginning on the date on which notice under subparagraph (B) is mailed or otherwise provided to the individual.

(2) Independent verification referred to in paragraph (1) requires investigation and confirmation of specific

information relating to an individual that is used as a basis for an adverse action against the individual, including where applicable investigation and confirmation of —

(A) the amount of any asset or income involved;

(B) whether such individual actually has or had access to such asset or income for such individual's own use; and

(C) the period or periods when the individual actually had such asset or income.

(3) Notwithstanding paragraph (i), an agency may take any appropriate action otherwise prohibited by such paragraph if the agency determines that the public health or public safety may be adversely affected or significantly threatened during any notice period required by such paragraph.

(q) Sanctions. — (1) Notwithstanding any other provision of law, no source agency may disclose any record which is contained in a system of records to a recipient agency or non-Federal agency for a matching program if such source agency has reason to believe that the requirements of subsection (p), or any matching agreement entered into pursuant to subsection (o), or both, are not being met by such recipient agency.

(2) No source agency may renew a matching agreement unless —

(A) the recipient agency or non-Federal agency has certified that it has complied with the provisions of that agreement; and

(B) the source agency has no reason to believe that the certification is inaccurate.

(r) Report on new systems and matching programs. — Each agency that proposes to establish or make a significant change in a system of records or a matching program shall provide adequate advance notice of any such proposal (in duplicate) to the Committee on Government Operations of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget in order to permit an evaluation of the probable or potential effect of such proposal on the privacy or other rights of individuals.

(s) Biennial report. — The President shall biennially submit to the Speaker of the House of Representatives and the President pro tempore of the Senate a report —

(1) describing the actions of the Director of the Office of Management and Budget pursuant to section 6 of the Privacy Act of 1974 during the preceding 2 years;

(2) describing the exercise of individual rights of access and amendment under this section during such years;

(3) identifying changes in or additions to systems of records;

(4) containing such other information concerning administration of this section as may be necessary or useful to the Congress in reviewing the effectiveness of this section in carrying out the purposes of the Privacy Act of 1974.

(t)(1) Effect of other laws. — No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

(2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title.

(u) Data Integrity Boards. — (1) Every agency conducting or participating in a matching program shall establish a Data Integrity Board to oversee and coordinate among the various components of such agency the agency's implementation of this section.

(2) Each Data Integrity Board shall consist of senior officials designated by the head of the agency, and shall include any senior official designated by the head of the agency as responsible for implementation of this section, and the inspector general of the agency, if any. The inspector general shall not serve as chairman of the Data Integrity Board.

(3) Each Data Integrity Board —

(A) shall review, approve, and maintain all written agreements for receipt or disclosure of agency records for matching programs to ensure compliance with subsection (o), and all relevant statutes, regulations, and guidelines;

(B) shall review all matching programs in which the agency has participated during the year, either as a source agency or recipient agency, determine compliance with applicable laws, regulations, guidelines, and agency agreements, and assess the costs and benefits of such programs;

(C) shall review all recurring matching programs in which the agency has participated during the year, either as a source agency or recipient agency, for continued justification for such disclosures;

(D) shall compile an annual report, which shall be submitted to the head of the agency and the Office of Management and Budget and made available to the public on request, describing the matching activities of the agency, including —

(i) matching programs in which the agency has participated as a source agency or recipient agency;

(ii) matching agreements proposed under subsection (o) that were disapproved by the Board;

(iii) any changes in membership or structure of the Board in the preceding year;

(iv) the reasons for any waiver of the requirement in paragraph (4) of this section for completion and submission of a cost-benefit analysis prior to the approval of a matching program;

(v) any violations of matching agreements that have been alleged or identified and any corrective action taken; and

(vi) any other information required by the Director of the Office of Management and Budget to be included in such report;

(E) shall serve as a clearinghouse for receiving and providing information on the accuracy, completeness, and reliability of records used in matching programs;

(F) shall provide interpretation and guidance to agency components and personnel on the requirements of this section for matching programs;

(G) shall review agency recordkeeping and disposal policies and practices for matching programs to assure compliance with this section; and

(H) may review and report on any agency matching activities that are not matching programs.

(4)(A) Except as provided in subparagraphs (B) and (C), a Data Integrity Board shall not approve any written agreement for a matching program unless the agency has completed and submitted to such Board a cost-benefit analysis of the proposed program and such analysis demonstrates that the program is likely to be cost effective. [FN3]

(B) The Board may waive the requirements of subparagraph (A) of this paragraph if it determines in writing, in accordance with guidelines prescribed by the Director of the Office of Management and Budget, that a cost-benefit analysis is not required.

(C) A cost-benefit analysis shall not be required under subparagraph (A) prior to the initial approval of a written

agreement for a matching program that is specifically required by statute. Any subsequent written agreement for such a program shall not be approved by the Data Integrity Board unless the agency has submitted a cost-benefit analysis of the program as conducted under the preceding approval of such agreement.

(5)(A) If a matching agreement is disapproved by a Data Integrity Board, any party to such agreement may appeal the disapproval to the Director of the Office of Management and Budget. Timely notice of the filing of such an appeal shall be provided by the Director of the Office of Management and Budget to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives.

(B) The Director of the Office of Management and Budget may approve a matching agreement notwithstanding the disapproval of a Data Integrity Board if the Director determines that —

(i) the matching program will be consistent with all applicable legal, regulatory, and policy requirements;

(ii) there is adequate evidence that the matching agreement will be cost- effective; and

(iii) the matching program is in the public interest.

(C) The decision of the Director to approve a matching agreement shall not take effect until 30 days after it is reported to committees described in subparagraph (A).

(D) If the Data Integrity Board and the Director of the Office of Management and Budget disapprove a matching

program proposed by the inspector general of an agency, the inspector general may report the disapproval to the head of the agency and to the Congress.

(6) In the reports required by paragraph (3)(D), agency matching activities that are not matching programs may be reported on an aggregate basis, if and to the extent necessary to protect ongoing law enforcement or counterintelligence investigations.

[(7) Redesignated (6)]

(v) Office of Management and Budget responsibilities. — The Director of the Office of Management and Budget shall —

(1) develop and, after notice and opportunity for public comment, prescribe guidelines and regulations for the use of agencies in implementing the provisions of this section; and

(2) provide continuing assistance to and oversight of the implementation of this section by agencies.